United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76—7383

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P/S

In the

United States Court of Appeals

For The Second Circuit

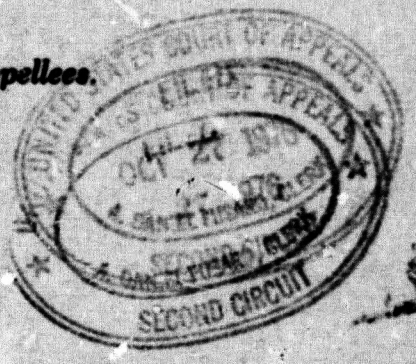
JACK A. KAMPMEIER, et al.,

Plaintiffs-Appellants,

vs.

EWALD NYQUIST, et al.,

Defendants-Appellees.



On Appeal from the Decision and Order
of the United States District Court
for the Western District of New York
Civ 76-167

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TABLE OF AUTHORITIES CITED

STATEMENT OF THE CASE

Appellants seek to reverse an Order denying preliminary injunctive relief issued by the Hon. Harold P. Burke in the United States District Court for the Western District of New York (Appendix, A-58).

Appellants are public junior high school students and their parents. The students desire to participate in intramural and interscholastic athletics including contact and collision sports.

Each of the infant plaintiffs has vision primarily restricted to one eye. The school medical inspectors of the appellee school districts have after examination declined to allow the students to participate in contact or collision sports by virtue of such disabling condition.

STATEMENT OF ISSUES

Whether preliminary injunctive relief was properly denied.

Whether refusal to grant such relief constituted an abuse of judicial discretion or was affected by a clear mistake of law.

ARGUMENT

Preliminary injunctive relief was properly denied.

PRELIMINARY INJUNCTIVE RELIEF WAS PROPERLY DENIED

Although plaintiffs would have this Court look beyond denial of preliminary injunctive relief to the merits of the underlying controversy, the law is well-settled that an interlocutory appeal from denial of a preliminary injunction raises only the propriety of denial of such preliminary relief. Within this narrow frame of reference, we respectfully submit that denial of preliminary relief was proper.

The burden of proof which recent decisions of this Court have placed upon a party seeking to overturn denial of a preliminary injunction is a rigorous one for an appellant to meet. The test is best stated in Pride v. Community School Board of Brooklyn, New York School District No. 18, 488 F. 2d 321 (1973) where this Court noted:

> "In our earlier opinion in this case [Pride I] this court stated as follows the standard by which the district court must be guided in deciding upon a motion for a preliminary injunction:
>
> > 'We repeatedly have emphasized the heavy burden on a party seeking the extraordinary remedy of preliminary injunctive relief. The standard that has evolved is that the moving party 'assume[s] the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that [it has] raised serious

> questions going to the merits and that the balance of hardships [tips] sharply in [its] favor.' Stark v. New York Stock Exchange, 466 F.2d 743, 744 (2 Cir. 1972) (Emphasis added); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2 Cir.), cert. denied 394 U.S. 999 [,89 S.Ct.1595, 22 L.Ed. 2d 777] (1969). We find that standard to be particularly appropriate here where there is a strong public interest in the outcome of the dispute. See, e.g., Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-693, 698-699 (2 Cir. 1973); Exxon Corp. v. City of New York, 480 F.2d 460 (2 Cir. 1973).
>
> 'With this standard in mind, we turn to an examination of the evidence adduced at the hearing below, recognizing that in reviewing the denial of a motion for a preliminary injunction our role is limited. 'A clear abuse of discretion . . . . must be shown to an appellate court in order to obtain a reversal of the trial court's denial of temporary injunctive relief.' Checker Motors Corp. v. Chrysler Corp., supra, 405 F.2d at 323; Dino de Laurentiis Cinematografica, S.p.A. v. D-150, Inc., 336 F.2d 373, 374-375 (2 Cir. 1966).'

482 F.2d at 264 (footnote omitted)."

An alternative statement of the burden may be found in other decisions of this Court:

> "And we must review its conclusions on the basis of whether there has been an abuse of discretion or a clear mistake of law. Exxon Corp. v. City of New York, 480 F.2d 460, 464 (2d Cir. 1973); Dino DeLaurentiis Cinematografica S.p.A. v. D-150, Inc., 366 F.2d 373 (2d Cir. 1966); Wright & Miller, Federal Practice and Procedure, Civil § 2962." (414 Theater Corp. v. Murphy, 499 F.2d 1155).

Using either of the two standards compelled by recent decisions of this Court, it is clear from a review of the pleadings and exhibits below that the requisite showing necessary for reversal of denial of preliminary injunctive relief has not been made, and that consequently the appeal must be dismissed.

Judge Burke properly exercised his discretion by declining to grant the extraordinary remedy of preliminary injunctive relief. Such decision was not affected by any clear mistake with respect to applicable law nor did such action constitute an abuse of judicial discretion.

Plaintiffs argue that exclusion from contact sports denies them equal protection of law. There is no legal basis for such conclusion. The starting point in the analysis of any "equal protection" case lies in determining the appropriate standard of judicial review which must be applied. In Green v. Waterford Board of Education, 473 F.2d 629, the Court of Appeals for the Second Circuit recently distinguished between the two traditional approaches to an "equal protection" action. It noted:

> "In recent years, the Supreme Court has developed what has been characterized as 'a rigid two-tier attitude' in equal protection cases. In most instances, statutory or regulatory classifications are presumptively constitutional and will not be disturbed unless they are without rational basis, resting 'on grounds wholly irrelevant to the achievement' of some permissible state purpose. McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101,

> 6 L.Ed.2d 393 (1961); see Morey v. Doud, 354 U.S. 457, 463-464, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957). In other cases, however, where the classification is grounded on certain 'suspect' criteria, e.g., Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), or where the classification impinges upon certain 'fundamental' rights, e.g., Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), 'strict' judicial scrutiny is required, and the classification will not stand unless justified by some 'compelling governmental interest.' E.g., Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)."

Education is not a fundamental right secured by the federal Constitution. In San Antonio Independent School District et al. v. Rodriguez et al., 411 U.S. 1, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), the United States Supreme Court, in a case involving the validity of a scheme for the financing of the public schools in Texas, specifically declined to apply the "strict judicial scrutiny" standard to an education-related case. The Court noted:

> "We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.
>
> . . .
>
> "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of

> the laws. Thus the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. Eisenstadt v. Bard, 405 U.S. 330 (1972); Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942).
>
> . . .
>
> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."

Since education is not a fundamental right, the "rational basis" standard of equal protection review must clearly govern the validity of the disputed classification. Under prevailing decision law, defendants' action must be affirmed if the classification rationally furthers some legitimate, articulated state purpose, or if it bears some rational relationship to a legitimate state purpose. It is the burden of the proponent of the invalidity of the classification to establish the lack of a rational basis. This burden, we respectfully submit, has not been met.

Education is not a fundamental right; it can hardly be argued that participation in interscholastic athletics has such constitutionally protected status. Characterization of participation in interscholastic athletics as a right or a privilege serves no useful purpose. Case law involving review of the validity of restrictions on participation in interscholastic athletic programs clearly holds that the "rational basis" test is the proper standard of "equal protection" review (Matter of Brenden v. Independent School District No. 742, 477 F.2d 1292; Associated Students, Inc., etc. v. National Col. Ath. Ass'n., 493 F.2d 1251; Howard University v. National Collegiate Ath. Ass'n., 510 F.2d 213).

Status as a "handicapped child" is not a "suspect" classification or criterion, compelling "strict" judicial scrutiny. The recent decision of the Court of Appeals of the State of New York in Matter of Levy, et al. v. City of New York, et al., 38 NY 2d 653, cert. den. U.S. Sup. Ct., October 4, 1976, 45 U.S.L.W. 3225, is directly on point, holding:

> "At the threshold of consideration of any equal protection claim is the determination of the applicable standard of review. Handicapped children as such do not constitute a 'suspect classification' (cf. Matter of Lalli, 38 NY 2d 77 [illegitimate children]; Matter of Malpica-Orsini, 36 NY 2d 568 [illegitimate children]; contrast Loving v. Virginia, 388 US 1 [race]; Hernandez v. Texas, 347 US 475 [national Origin]; Matter of Griffiths, 413 US 717 [alienage]). Nor is the right to education such a 'fundamental constitutional right' as to be entitled to special constitutional protection (San Antonio School Dist. v. Rodriquez, 411 US 1, 16). Accordingly, the

> appropriate standard is not the so-called strict scrutiny test or anything approaching it, but rather the traditional rational basis test. (Montgomery v. Daniels, 38 NY 2d 41, 59 cf. Matter of Jesmer v. Dundon, 29 NY 2d 5, app dsmd 404 US 953.)"

In addition, federal decisional law in cases other than those involving absolute denial of education assumes the applicability of the traditional rational basis test in cases involving education of handicapped children (Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F.Supp. 279; Mills v. Board of Education, 348 F.Supp. 866; LeBank v. Spears, 60 F.R.D. 135; Doe v. Laconia Supervisory Union No. 30, 396 F.Supp. 1291).

Plaintiffs argue that Title 29 USC § 701, et. seq. (section 504 of the Rehabilitation Act of 1973) precludes exclusion of a handicapped child from competitive athletics. The argument is patently frivolous. Where a rational basis exists for limiting athletic eligibility, such action neither violates "equal protection" nor the provisions of section 504.

Plaintiffs challenge the validity of section 135.4(c)(7)(i)(h) of the Regulations of the Commissioner of Education, arguing that defendants Nyquist and Soucy have compelled exclusion of the infant plaintiffs from competitive athletics in contact sports. This is untrue. The disputed regulation provides that among other duties, a board of education shall have:

> "(h) to provide adequate health examinations before participation in strenuous activity and periodically throughout the season as necessary, and to permit no pupil to participate in such activity without the approval of the school medical officer."

Section 902 of the Education Law of the State of New York authorizes and requires each district to employ a competent physician as medical inspector for the primary purpose of giving medical examinations to district pupils. A common duty of the school medical inspector is to provide physical examinations for pupils interested in competing in athletics.

Section 135.4(c)(7)(i)(h) of the Regulations merely restates the obvious conclusion that where the school medical inspector determines that there are medical reasons for restricting competition, a student should not be allowed to compete free from such restrictions. In each instance, it is the decision of the school medical inspector rather than of the State Education Commissioner which determines ineligibility or otherwise restricts athletic eligibility. Thus, we respectfully submit that Judge Burke erroneously denied defendants' cross-motion to dismiss the complaint against defendants Nyquist and Boucy on the grounds that such complaint fails to state a claim on which relief may be granted as against such defendants.

The State Education Department has periodically disseminated materials published by the American Medical Association as a guide to school medical inspectors called upon to make determinations with respect to athletic eligibility. These materials (Appendix, A-33 to A-42) are intended solely as guidelines for the exercise of such professional judgment, rather than as absolute limitations on eligibility. The "Note" appended to the most recent addition of the pamphlet specifically cautions against mechanical operation of the material therein and provides:

> "Each patient should be judged on an individual basis. All things being equal, it is probably better to encourage a young boy or girl to participate in a non-contact sport rather than a contact sport. However, if a particular patient has a great desire to play a contact sport, and this is deemed a major ameliorating factor in his/her adjustment to school, associates and the seizure disorder, serious consideration should be given to letting him/her participate if the seizures are controlled." (Appendix, A-41).

Since in each instance a determination with respect to eligibility must be made on an individual basis, section 504 of the Rehabilitation Act of 1973 is not offended. There is no automatic classification or stereotyping of a handicapped individual to offend those provisions banning discrimination on the basis of handicap.

There is a rational basis for restricting the athletic eligibility of a child with vision in one eye from participating in contact or collision sports. Among the primary responsibilities

of members of boards of education are to equalize, insofar as possible, the powers of opponents in individual and group athletic competition and to give primary consideration to the well-being of participants [8 NYCRR § 135.4(c)(7)(i), (d) and (g)]. An obvious component of any decision with respect to eligibility is the risk which participation will entail to the participant and to others. It takes very little imagination to predict the potential consequences which may flow where a child with vision in one eye is injured in athletic competition, and it would be unreasonable to preclude a board of education or school medical inspector from factoring such risk into the process by which a determination with respect to eligibility is made. Blindness is a possibility that cannot be ignored, notwithstanding the willingness of the infant plaintiffs or their parents to assume such risk as a condition of participation.

Lack of vision in one eye will place the participant in an unequal competitive position with respect to his potential adversaries, substantially increasing the possibility of mishap. The student will lack the vision necessary to compete fully and will not have the depth perception of his teammates or adversaries. Missing visual cues, occasioned by such lack of vision, may well endanger the student and his teammates.

A secondary factor which must be considered is the potential liability which confronts a school district which allows a child with limited or no vision in one eye to participate in a contact or collision sport. No minor or his parent may legally waive or release the rights of a minor to sue a school district for its negligent acts. Authorizing participation might well constitute negligence, where the great weight of current medical opinion would preclude permitting a child with no vision in one eye from competing in contact sports. If a district ignores current medical opinion, expressed in the A.M.A. guidelines, it proceeds at great peril. Parenthetically, it should be noted that plaintiffs sought to purchase liability insurance to protect their respective districts from any potential liability should an accident arise, but that no carrier was willing to write a policy to insure the risk.

Plaintiffs have suggested that the infant plaintiffs should be allowed to participate wearing protective headgear or other orthopedic appliances. What is adequate protection is a question of both fact and judgment. Further, plaintiffs ignore the issue of who shall bear the responsibility for the constant supervision necessary to assure that infant plaintiffs will actually wear such equipment in the proper or prescribed manner and at all times and places.

The particular facts of this case mitigate against the preclusion that Judge Burke abused his discretion by declining to grant preliminary injunctive relief. The exhibits submitted by plaintiffs are cautious in nature and do not support the proposition that plaintiffs' personal physicians saw no or little risk in unlimited competition in contact sports. Dr. Donovan's letter of September 22, 1975, (with respect to the status of Margaret Kampmeier) cautions:

> "I feel that with special protective eye wear the risk to either eye is rather remote. However, there is a risk, and the protective eye wear would by no means guarantee the safety of her eyes. I hope that this will be of help to you in deciding in the question of the contact sports for this student." (Appendix, A-17)

Dr. Caccamise's letter of December 16, 1975 (with respect to the status of Steven Genecco) specifically refutes his contention that he should be permitted to participate in contact sports. The letter states, insofar as pertinent:

> "It is my opinion that the disadvantages of participating in contact sports far outweigh any possible advantages in this one-eyed boy. I, therefore, feel that his athletic activities should be limited to so-called non-contact sports such as tennis, track, non-diving swimming, cross country skiing, and cautious Alpine skiing. An attempt was made to emphasize my thoughts on this matter to the mother." (Appendix, A-23, 24)

Neither of the statements from the infant plaintiffs' own physicians suggest that such infant plaintiff can safely be per-

mitted to participate in contact sports. Absent such clear evidence, it strains credibility to suggest that Judge Burke should have granted preliminary relief inconsistent with the best medical judgment of not only the school medical inspectors of the defendant school districts, but also of the physicians selected by plaintiffs themselves.

Plaintiffs refer this Court to district court decisions in Suemnick v. Michigan High School Athletic Association, et al. (U.S.D.C.; E.D. Mich.; 1973) and in Borden v. Rohr (U.S.D.C.; S.D. Ohio; 1976). The Suemnick case involved an infant plaintiff who sought to participate in contact sports wearing a prosthetic appliance below the knee. The Court found that the potential danger flowing from participation was minimal in nature. Borden involved a college student who like the infant plaintiffs had vision in one eye yet sought to participate in contact sports. While the Court did grant preliminary relief, it stressed the maturity of the plaintiff and his ability to make a mature judgment, to ". . . live his own life, risk it, risk his eye to some degree." Plaintiffs here are far younger than the plaintiff in Borden and have less capacity for making an independent evaluation of the risks inherent in participation. They cannot in this point in their lives make a mature or reasoned decision to assume the risk of blindness.

Several recent state court decisions and a recent quasi-judicial decision of the State Education Commissioner have found a rational basis for restricting athletic eligibility in contact sports for certain handicapped children. In Matter of Spitaleri, 12 Ed. Dept. Rep. 84, defendant Nyquist declined to substitute his judgment for the school medical inspector in the Hempstead Union Free School District in a case on all fours with the instant action. The Commissioner noted:

> "Apparently relying upon these guidelines together with his own best medical judgment, the school district physician determined that petitioner should not be allowed to compete in football.
>
> "The prime rationale for such a determination is, of course, the welfare of the student involved. A board of education has a responsibility to act in the best interests of the pupils of the district. This is true even when the pupil and his parents may be willing to undertake a particular risk.
>
> "Of secondary concern to a board of education is its possible liability in the event of an injury to a student who was permitted to compete in athletics even after the board was aware of some physical problem on the part of the student. Counsel for the petitioner has conceded that since petitioner is a minor, neither he nor his parents may waive his right to bring legal action against the school district in the event of an injury, including an injury which might impair the function of his normal eye. It has been suggested by petitioner's counsel that petitioner's parents might enter into an indemnification agreement with the school district or purchase some type of insurance to protect the district. The advisability of accepting such a proposal is not for me to determine. This is a determination to be

made by the board of education with the assistance of its counsel, but would of course be appropriate for consideration only if the school physician should conclude that petitioner's best interests permit his participation in contact sports."

An Article 78 proceeding was brought in Supreme Court, Albany County from Commissioner's decision in Spitaleri. Mr. Justice A. Franklin Mahoney dismissed the petition to review. He stated:

"The Commissioner's determination recognizes the duty of the Board of Education 'to provide adequate health examinations before participation in strenuous activity * * * and to permit no pupil to participate in such activity without the approval of the school medical officer' (8 NYCRR 135.4[e][1][VII] of the Regulations of the Commissioner of Education). In furtherance of that duty the School Board had the petitioner examined by the school physican for Union Free School District No. 5, Levittown, New York and Dr. Cytryn, employing the regulations of the Board of Education, the State Education Department requirements and the American Medical Association criteria as set forth in a pamphlet entitled 'A Guide for Medical Evaluation for Candidates for School Sports', found that the petitioner was medically disqualified from participation in interscholastic football competition. The above-cited AMA pamphlet particularizes as a disqualifying condition for contact sport participation the instance where a youth is without one of two organs such as kidney or an eye. Clearly, the concern of the AMA and of the school physician as well as those physicians who hold to the view that he should be permitted to play, is the always present danger of injury to the remaining organ which, if it should occur, would result in irreversible and permanent injury. In the case of the petitioner herein, total blindness.

> "In my view, it cannot be said that the dismissal of petitioner's appeal to the Commissioner of Education was freighted with arbitrariness, capriciousness or illegality so as to compel reversal. The Commissioner acted within his powers and, based upon uncontradicted medical evidence, in the best interest of the infant petitioner." (74 Misc. 2d 811)

In Matter of Colombo (Sewanhaka Central High School District) Judge Berman in Supreme Court, Nassau County (N.Y.L.J., May 20, 1976; p. 11 Cols. 4-6) refused to interfere with the determination of a school medical officer to prohibit an individual who was totally deaf in one ear and had 50% loss in his other ear from participating in contact sports. Judge Berman noted:

> "The court recognizes the psychological factors involved in the denial to John of the right to participate in contact sports and, indeed, has great concern for and sympathy with his plight. However, the medical determination of Dr. Samuels, the court finds, was a valid exercise of judgment and was not arbitrary or capricious since: (a) there exists the risk of danger of injury to the ear in which there is only partial hearing and to which further injury could result in irreversible and permanent damage - in this case, total deafness; (b) aside from the risk of injury to his partially good ear, there also exists the possibility of injury to other parts of John's body by reason of his failure to perceive the direction of sound; and (c) there is the possibility of injury to other participants. Even though these risks may all be minimal in this court's opinion it is sound judgment for the school district to follow the advice of its own medical director and the AMA Guide and prohibit John from participating in contact sports."

We respectfully submit that plaintiffs have failed to establish that denial of preliminary injunctive relief on the within record constituted an abuse of discretion or that such denial was affected by a clear mistake of law. The appeal should therefore be dismissed.

CONCLUSION

For the foregoing reasons, appellees Nyquist and Soucy respectfully submit that the decision of the Court below denying preliminary injunctive relief should be affirmed.

DATED: October 15, 1976
Albany, New York

Respectfully submitted,

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STATE OF NEW YORK:
: SS.:
COUNTY OF ALBANY :

Susan B. Grugan being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 23 Beacon Avenue, Albany, New York, 12203. That on the 21st day of October, 1976 deponent served three copies of the within Memorandum of Law upon the individuals designated below at the designated addresses below, by depositing true copies of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Susan B. Grugan

Sworn to before me this
21st day of October, 1976

Norman H. Gross

NORMAN H. GROSS
Notary Public in the State of New York
Residing in Albany County
My Commission Expires March 30, 19[illegible]

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